

SOUTH AFRICA / JUDGMENT

Competition Commission v Pistorius N.O. and Others (CR150Oct13/SA 155Dec23) [2024] ZACT 6 (13 February 2024)

[2024] ZACT 6

COURT

Competition Tribunal

BEFORE

L Mncube, T Vilakazi, A Ndoni

CASE / FILE NUMBER

CR150Oct13/SA 155Dec23

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COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: CR150Oct13/SA 155Dec23

In the matter between: The Competition Commission Applicant And Leo Constantin Pistorius N.O. First Respondent Hermine Pistorius N.O. Second Respondent Arnoldus Kurt Pistorius N.O. Third Respondent Daniel Hendrik Du Plessis N.O. Fourth Respondent Sanette Fourie N.O. Fifth Respondent H Pistorius and CO (Pty) Ltd Sixth Respondent

Panel L Mncube (Presiding Member)

T Vilakazi (Tribunal Member)

A Ndoni (Tribunal Member)

Heard on 13 February 2024

Decided on 13 February 2024

Settlement Agreement

The Tribunal hereby confirms the settlement agreement as agreed to and proposed by the Competition Commission and Leo Constantin Pistorius; Hermine Pistorius N.O; Arnoldus Kurt Pistorius; Daniel Hendrik Du Plessis N.O; Sanette Fourie N.O; H Pistorius & CO (Pty) Ltd annexed hereto.

Signed by Liberty Mncube

Signed at 2024-02-13 14:46:32 +02 00

Reason Witnessing Liberty Mncube

Presiding Member

13 February 2024

Professor Liberty Mncube

Date

Concurring: Professor Thando Vilakazi and Ms Andiswa Ndoni

IN THE COMPETITION TRIBUNAL OF SOUTH AFRICA

(HELD IN PRETORIA)

CC Case No 2008Aug3929

CT Case No:

In the matter between THE COMPETITION COMMISSION Applicant And LEO CONSTANTIN PISTORIUS N.O. First Respondent HERMINE PISTORIUS N.O. Second Respondent ARNOLDUS KURT PISTORIUS N.O. Third Respondent DANIEL HENDRIK DU PLESSIS N.O. Fourth Respondent SANETTE FOURJE N.O. Fifth Respondent H PISTORIUS & CO (PTY) LTD Sixth respondent

SETTLEMENT AGREEMENT BETWEEN THE COMPETITION COMMISSION AND THE FIRST TO SIXTH RESPONDENTS IN RESPECT OF AN ALLEGED CONTRAVENTION OF SECTION 6(2) OF THE COMPETITION ACT, 1998 (ACT NO.

89 OF 1998), AS AMENDED

1.

PREAMBLE

The Competition Commission and the Hendrik Pistorius Trust as represented by the trustees (first to sixth Respondents) hereby agree that an application be made to the Competition Tribunal for the confirmation of this Settlement Agreement as an order of the Competition Tribunal in terms of section 27(1)(d) read with section 58(1)(a)(iii) of the Competition Act 89 of 1998, as amended ("the Act"), in respect of a contravention of section 5(2) of the Act.

2. DEFINITIONS

For the purposes of this Settlement Agreement, the following definitions shall apply:

2.1 "Act" means the Competition Act, 1998 (Act No. 89 of 1998), as amended;

2.2 "Aglime" means a soil additive produced from pulverised limestone or chalk, and Includes calcitic agricultural lime ("CAL") and dolomitic agricultural lime ("DAL");

2.3 "Arnoldus Kurt Pistorius N.O." means Arnoldus Kurt Pistorius in his capacity as a trustee for the time being of the Hendrik Pistorius Trust;

2.4 "CAL" means calcitic agricultural lime which is one of the two types of aglime;

2.5 "Commission" means the Competition Commission of South Africa, a statutory body established in terms of section 19 of the Act, with its principal place of business at Mulayo Building (Block C), the DTI Campus, 77 Meintjies Street, Sunnyside, Pretoria, Gauteng;

2.6 "Commissioner" means the Commissioner of the Commission, as appointed by the Minister of Trade and Industry and Competition in terms of section 22(1) of the Act;

2.7 "Complaint" means the complaint submitted by Enviro Lime (Pty) Ltd on 20 August 2008 in terms of section 49B(2)(b) of the Act and investigated by the Commission under CC case number. 2008Aug3929;

2.8 "Daniel Hendrik Du Plessis N.O." means Daniel Hendrik Du Plessis in his capacity as a trustee for the time being of the Hendrik Pistorius Trust;

2.9 "Days" means business days, being any day, which is not a Saturday, Sunday or public holiday gazetted in the Republic of South Africa from time to time;

2.10 "H Pistorius & Co (Pty) Ltd" means H Pistorius & Co (Pty) Ltd, a company duly registered in accordance with the laws of the Republic of South Africa, with its principal place of business situated at 50 Frances Street, Colbyn, Pretoria, Gauteng;

2.11 "H Pistorius & Co" means the tradename used by the Hendrik Pistorius Trust to conduct its business as a supplier of CAL at the time of the alleged contravention;

2.12 "Hendrik Pistorius Trust" refers to the trust duly registered in terms of the laws of the Republic of South Africa under trust deed number IT11463 and is represented by the trustees as reflected in the most recent and amended Letter of Authority dated 22 June 2022. The Hendrik Pistorius Trust trades as "H Pistorius & Co." at 50 Frances Street, Colbyn, Pretoria, Gauteng;

2.13 "Hermine Pistorius N.O." means Hermine Pistorius in her capacity as a trustee for the time being of the Hendrik Pistorius Trust;

2.14 "Leo Constantin Pistorius N.O." means Leo Constantin Pistorius in his capacity as a trustee for the time being of the Hendrik Pistorius Trust;

2.15 "Parties" means the Commission and the first to sixth respondents;

2.16 "Respondents" means the first to sixth respondents;

2.17 "Sanette Fourie N.O." means Sanette Fourie in her capacity as a trustee for the time being of the Hendrik Pistorius Trust;

2.18 "Settlement Agreement" means this agreement duly signed and concluded between the Commission and the Respondents;

2.19 "Settlement Amount" means the amount agreed upon in full and final settlement between the parties;

2.20 "Tribunal" means the Competition Tribunal of South Africa, a statutory body established in terms of section 26 of the Act, with its principal place of business at the 1st Floor, Mulayo Building (Block C), the DTJ Campus, n Meintjies Street, Sunnyside, Pretoria, Gauteng; and

2.21 "Trustees" are the most recent trustees of the Hendrik Pistorius Trust as reflected In the most recent Letter of Authority attached hereto as Annexure

3. COMPLAINT INITIATION AND INVESTIGATION

3.1 On 20 August 2008, the Commission received a complaint in terms of section 49B(2)(b) of the Act from Enviro Lime (Pty) Ltd ("Enviro Lime"), a distributor of CAL In the complaint, Enviro Lime alleged that H Pistorius & Co., a supplier of CAL, was engaged in restrictive vertical practices and abuse of dominance.

3.2 Enviro Lime, inter alia, alleged that H Pistorius & Co. was engaged in the practice of resale price maintenance of CAL in contravention of section 5(2) of the Competition Act. According to Enviro Lime, H Pistorius & Co. was imposing minimum resale prices at which the distributors of CAL were required to sell or market CAL that they purchased from it, and that distributors could not sell or market CAL below the price prescribed by H Pistorius Co. As stated above, agtime is a soil additive produced from pulverised limestone or chalk and Includes calcitic agricultural lime- and dolomitic agricultural lime.

3.3 H Pistorius & Co. is vertically integrated. It operates in the upstream market as a manufacturer of aglime which It supplies to distributors, agents and fanners, and also operates in the downstream market as a distributor of aglime. H Pistorius & Co. competes with other distributors of CAL such as Kalkor (Pty) Ltd ("Kalkor"), Enviro Lime and SA Lime and Gypsum (Pty) Ltd ("SA Lime & Gypsum").

3.4 The Commission Investigated Enviro Lime's complaint and found information that suggested that the Respondents imposed minimum resale prices at which the distributors of CAL were required to self or market CAL. In particular, the Commission's Investigation found that the Respondents, being suppliers and distributors of CAL, allegedly imposed minimum prices at which distributors of CAL were required to sell or market the CAL that the Respondents supplied to the distributors. Distributors could not sell or market CAL below the price prescribed by the Respondents.

4. THE COMPLAINT REFERRAL

4.1 On 31 October 2013, the Commission referred the Enviro Lime complaint to the Tribunal against H Pistorius & Co (Pty) Ltd, Kalkor, Enviro Lime and SA Lime & Gypsum for alleged contravention of section 5(2) of the Act.

4.2 The Commission's complaint referral alleged that H Pistorius & Co (Pty) Ltd engaged in the practice of minimum resale price maintenance during the period 2004 to 2010 in that H Pistorius & Co (Pty) Ltd:

4.2.1 would publish its price and would require the distributors to sell or market CAL in accordance with the said price list;

4.2.2 would instruct distributors not to sell or market CAL supplied by H Pistorius & Co (Pty) Ltd at prices lower than those set out in H Pistorius & Co (Pty) Ltd price list. H Pistorius & Co (Pty) Ltd price list was compiled annually, usually around April when the price of CAL would increase; and

4.2.3 would, in order to monitor the distributors' compliance with this practice, request distributors to submit their price lists to H Pistorius & Co (Pty) Ltd on an ad hoc basis. These price lists set out the distributors' CAL prices.

4.3 In the complaint referral, the Commission only sought relief against H Pistorius & Co (Pty) Ltd for alleged contravention of section 5(2) of the Act. The other respondents

(Kalkor, Enviro Lime and SA Lime & Gypsum) were cited only for the interest they have in the matter. The Commission did not seek any relief against them.

4.4 On 19 June 2017, pursuant to a joinder application by the Commission, the Tribunal joined the Hendrik Pistorius Trust as represented then by the trustees (Hendrik Wilhelm Carl Pistorius N.O., Leo Constantin Pistorius N.O., Hermine Pistorius N.O., Arnoldus Kurt Pistorius N.O., Ian McIntyre N.O. and Daniel Hendrik Du Plessis N.O.) to the complaint referral proceedings (CR1500ct13) as the fifth to tenth respondents in their capacities as trustees of the Hendrik Pistorius Trust.

4.5 Mr Hendrik Wilhelm Carl Pistorius and Mr Ian McIntyre, who was cited in the Commission's referral as the first and fifth respondents, respectively, have since passed away; hence they are not cited as respondents in this Settlement Agreement. Mr. Hendrik Wilhelm Carl Pistorius has not been replaced, and Mr Ian McIntyre has been replaced by Ms. Sanette Fourte who is cited in this settlement Agreement as the Fourth Respondent in her capacity as one of the current trustees of the Hendrik Pistorius Trust.

5. RESPONDENTS' POSITION

5.1 The Respondents deny that the conduct of H Pistorius & Co. constitutes the practice of minimum resale price maintenance as provided for in section 5(2) of the Act for the following reasons:

5.1.1 The price at which distributors provide their services and sell their products, including H Pistorius & Co.'s products, was determined by the distributors independently of H Pistorius & Co. and was subject to each distributor's discount structure;

5.1.2 The Respondents never affirmed, implemented, or adhered to any minimum resale price maintenance policy. Their relationships with their clients were based on independent arrangements with retailers based on fair market rates, reflecting the value of the services they provided;

5.1.3 H Pistorius & Co. did not deny any distributor any benefits or support (whether price or non-price related) based on Its non-compliance with so- called "minimum" resale prices; and

5.1.4 The adjustment In discount was purely ancillary to the commercial decision to minimize H Pistorius & Co's business risk. It was never the Respondents' intention to act anti-competitively towards any distributor as contemplated in the Competition Act as the conduct was ancillary to a legitimate commercial concern.

6. NO ADMISSION OF LIABILITY

6.1 The Respondents do not admit that they acted in contravention of section 5(2) or any other provision of the Act as described In paragraph 4 above. Nonetheless, the Parties have agreed to enter into the Settlement Agreement without any such admission.

6.2 Although the Respondents initially opposed the complaint, they have entered into a settlement as a pragmatic resolution to a long-standing dispute. The Respondents acknowledge that:

6.2.1 Legal proceedings can be lengthy, costly, and distracting. The Respondents prefer to focus their resources and attention on serving their- customers and growing their business;

6.2.2 Settling is in the best Interest of all parties involved and will enable the Respondents to put this matter behind them and move forward with a renewed commitment to fairness, honesty, and transparency in all their business dealings.

7. SETTLEMENT AMOUNT

7.1 Hendrik Pistorius Trust agrees to make payment of a settlement amount in the amount of R661 151.21 (Six hundred and sixty-one thousand, one hundred and fifty-one Rand and twenty-one cents). This amount does not exceed 10% of H Pistorius & Co.'s annual turnover in its most recent financial year

7.2 Hendrik Pistorius trust will pay the settlement amount over a period of 6 (six) months in six equal instalments of R110 191. 87 (One hundred and ten thousand, one hundred and ninety-one Rand and eighty-seven cents).

7.3 The first instalment shall be paid within 30 (thirty) days from the data of confirmation of this Settlement Agreement by the Tribunal. The balance of the settlement amount shall be paid in 5 (five) equal instalments, over a period of 5 months from the date of the first instalment. The balance of the instalments shall be due on the last date of each month.

7.4 The payment shall be made into the Commission's bank account, details of which are as follows:

NAME

: THE COMPETITION COMMISSION

BANK

: ABSA BANK BUSINESS BANK

ACCOUNT NUMBER : 4[...]

BRANCH CODE : 632005

PAYMENT REF

: 2008Aug3828HWC Pistorius

7.5 The Commission shall pay the settlement amount over to the National Revenue Fund in accordance with section 59(4) of the Act.

8. AGREEMENT REGARDING FUTURE CONDUCT AND MONITORING

8.1 Hendrik Pistorius Trust undertakes to refrain from engaging in any anti- competitive conduct In contravention of the Act in future.

8.2 Hendrik Pistorius Trust will develop, implement and monitor a competition law compliance programme as part of Its corporate governance policy, which is designed to ensure that all employees, management and other functionaries do not engage in contravention of the Act. In particular, a such compliance programme will include mechanisms for the identification, prevention, detection and monitoring of any contraventions of the Act.

8.3 Hendrik Pistorius Trust shall submit a copy of the compliance programme to the Commission within 60 (sixty) days of the date of confirmation of the Settlement Agreement as an order of the Tribunal.

8.4 Hendrik Pistorius Trust shall circulate a statement summarising the contents of this Settlement Agreement to all employees, management and functionaries within 60 (sixty) days from the date of confirmation of the Consent Agreement as an order of the Tribunal, and report to the Commission once this obligation has been complied with.

8.5 All reports concerning the conditions set out In this Settlement Agreement, including but not limited to, the provision of the compliance programme and proof of payment of the settlement amount contemplated In clause 8 shall be submitted to the Commission at Collections@compcom.co.za .

9. FULL AND FINAL SETTLEMENT

This Settlement Agreement is entered into in full and final settlement of the Complaint, and upon confirmation as an order of the Tribunal, concludes all proceedings between the Commiasion and the Respondents In respect of conduct contemplated under the Commission's Investigation and Referral under case number: 2008Aug3929.

FOR THE RESPONDENTS:

Duly authorized signatory

LEO CONSTANTIN PISTORIUS (Full names)

Director

DATED AND SIGNED AT PRETORIA ON THE 12TH DAY OF DECEMBER 2023

FOR THE COMPETITION COMMISSION OF SOUTH AFRICA:

DORIS TSHEPE

The Commissioner

DATED AND SIGNED AT PRETORIA ON THE 14TH DAY OF DECEMBER 2023

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